No. 98-405, 98-406

In The

Supreme Court of the United States

October Term, 1998

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES,

Appellant, and

GEORGE PRICE, *et al.*,

Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,

Appellee.

**On Appeal From The
United States District Court
For The District Of Columbia**

MOTION TO DISMISS OR AFFIRM

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Appellee moves to dismiss or affirm on the ground that the Court lacks jurisdiction and that the question presented is so insubstantial as not to need further argument.

COUNTERSTATEMENT

Appellants desperately seek to obscure several dispositive factual issues that demonstrate that this Court should not review the validity of the Bossier Parish School Board's redistricting plan. Specifically, in adopting the plan at issue here, the School Board selected the only plan presented to it that conformed to state law, since private appellants' maximization plan (the "NAACP plan") concededly constituted a facial violation of state law and thus was "null and void." J.A. 266.[1] Moreover, the plan that was chosen had already been precleared by the Department of Justice just one year before. Standing alone, these two legitimate interests demonstrate that the School Board did not adopt its redistricting plan with a discriminatory purpose. The election results under this plan underscore this conclusion. There have been two elections conducted pursuant to the plan. In 1994, two black candidates were elected to the School Board, one from a district which was only 26.7% black. J.A. 47; jurisdictional statement of the United States at 5 n.3 ("U.S. J.S."). In 1998, these two black incumbents were reelected without opposition. In this election, a third black candidate ran for office and was elected over a white Republican in a district that is only 21.1% black. J.A. 47. Thus, under the School Board's plan, there are now currently three black members on the School Board. Despite the success of minority candidates running under the plan, appellants seek to have this Court invalidate this plan on the ground that it was discriminatory for the School Board not to have adopted a racially gerrymandered redistricting plan with *two* black-majority districts.

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[1] In this brief, citations are to the Appendix ("App.") filed with the jurisdictional statements in this appeal and to the Joint Appendix ("J.A.") filed in the prior appeal in this case.

In any event, a remand here to require the district court to consider whether it was necessary to adopt appellants' maximization plan would be both counterproductive and futile. As the minority population of Bossier Parish is already represented by three minority members on the School Board, it would be nonsensical to require the School Board to adopt a plan that packs the black population into two octopus-like districts, and thereby diminishes the prospects for electing a third minority member. Moreover, any such effort would be pointless as the next elections for the School Board will not be held until 2002. By that time, new census figures will be available, and the School Board will be required to redistrict prior to its next elections. Thus, the School Board plan will never again be utilized. As we demonstrate below, this incontrovertible fact renders any decision as to the future application of the plan wholly advisory under Article III, as appellants have no legally cognizable interest in enjoining an otherwise moribund law and appellee has no interest in a declaratory judgment relating to a plan it has abandoned.

In light of appellants' gross factual distortions, an extended counter-statement of the case is required.

Bossier Parish is located in northwestern Louisiana and is governed by a Police Jury, the 12 members of which are elected from single-member districts for consecutive four-year terms. Although no electoral district of the Police Jury has ever had a majority of black voters, Jerome Darby, a black resident of Bossier Parish, had been elected three times (the last time without opposition) by 1992 to represent a majority-white district as a member of the Police Jury. App. 79a. Another black representative preceded Mr. Darby in that district.

Because of demographic shifts that were reflected in the 1990 census, the Police Jury was obliged by Louisiana law to redraw its electoral districts. The aim of this redistricting was to change existing boundaries as little as possible while fashioning districts of roughly the same population. App. 79a. On April 30, 1991, all members of the Police Jury, including

Jerome Darby, its black member, approved a plan containing two districts with substantial black populations, but no district with a black majority. Specifically, District Four was 45.2% black, and District Seven was 43.9% black. App. 167a ¶ 59. The plan was submitted to the Justice Department on May 28, 1991, and on July 29, 1991, the Attorney General precleared it. Contrary to the insinuations of the appellants, the Police Jury submitted all materials required under Section 5; a covered jurisdiction is under no obligation to submit objections received from citizens or special interest groups. 28 C.F.R. §§ 51.53-51.58. After the Attorney General's preclearance, new elections were held. For the third consecutive time, Jerome Darby was elected from a majority-white district. App. 79a.

The Bossier Parish School Board was also required to redraw its electoral districts. Given that the School Board and the Police Jury had shared the same district boundaries until 1980, the School Board approached the Police Jury to formulate a common redistricting plan. App. 79a. The Police Jury rejected this overture and adopted its own redistricting plan. State law expressly prohibited the School Board from changing, splitting, or consolidating the precincts established by the Police Jury for the Police Jury's 1991 redistricting plan. J.A. 265-66 ("The boundaries of any election district for a new apportionment plan from which members of a school board are elected shall contain whole precincts established by the parish governing authority under R.S. 18:532 or 532.1."). Thus, it would have been a facial violation of state law for the School Board to adopt the NAACP plan, or for that matter any plan that created a black majority district, because as the parties have stipulated: "[i]t is impossible to draw, on a precinct level, a black-majority district in Bossier Parish without cutting or splitting existing precinct lines." App. 195a ¶ 152. The failure to abide by this mandatory state law requirement would have rendered the Board's plan "null and void." J.A. 266.

Appellants have sought to undermine the force of this state law requirement by consistently making the demonstrably false assertion that the School Board could have requested the *Police Jury* to split precinct lines so that the NAACP plan might be adopted. Appellants neglect to mention the unambiguous state law which makes clear that the School Board could not have gone back to the Police Jury in an effort to have precincts split. Under state law, the School Board was required to redistrict *prior to December 31, 1992*. J.A. 65; LA R.S. 17:71.5A. And under state law, the Police Jury could only make changes to its existing precincts *after December 31, 1992*. J.A. 277. Thus, it was *impossible* for *either* the School Board or the Police Jury to sanction any precinct splits prior to the mandatory deadline for the School Board to adopt a redistricting plan.[2] This requirement under state law that school boards and Police Juries use the *same* precincts as "building blocks" for their districts is, of course, entirely rational.[3] Splitting precincts by divergent district lines engenders substantial costs and creates significant voter confusion. App. 107a; *see Bush v. Vera*, 517 U.S. 952, 974-75

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[2] The United States argued in *Bossier I* that it was permissible for the Police Jury to *consolidate* precincts after January 1, 1993. *See* Transcript of Supreme Court Oral Argument at 55-56. This, of course, is irrelevant because there is nothing to consolidate if precincts have not been split in the first place. As noted, such splits could not occur because both the *Police Jury and the School Board* were barred from splitting precincts in the timeframe permitted under state law for the School Board to finalize its redistricting plan.

[3] Although it is true, as appellants note, that the Police Jury and School Board used different *district* lines for the first time in the 1980s, they had *never* split precinct lines and there is no evidence that any of the redistricting plans submitted for the Board's consideration by its cartographer created such splits. Appellants' own witness was able to cite only three examples of *other* Louisiana jurisdictions that had split a "few" precincts, J.A. 137, and all of those apparently were done to accommodate the Justice Department objections, as permitted by state law. J.A. 277. That is not relevant here as the Justice Department had not interposed any objection here in December 1992.

(1996). Thus, even assuming (as the district court did to give appellants every benefit of the doubt) that the Police Jury somehow could have retroactively created 65 additional precincts to render the NAACP plan lawful, neither it nor the School Board had any rational reason to do so.

Moreover, the conclusion that state law prohibited the adoption of any plan creating a black-majority district was uniformly acknowledged by the parties at the time the School Board was considering which plan to adopt. Specifically, the School Board was correctly advised both by its cartographer and the Parish's District Attorney during the September 3, 1992 meeting where the NAACP plan was presented that its massive number of precinct splits violated state law. App. 83a-84a; App. 179a ¶ 102. Likewise, the NAACP itself acknowledged this state law prohibition in 1992, and merely contended that the Supremacy Clause of the United States Constitution required the School Board to ignore state law. J.A. 122.

Subsequently, George Price, president of the local chapter of the NAACP and an appellant-intervenor in this case, submitted his own plan to the School Board that included two majority-black districts, the maximum possible number of such districts and roughly proportional (2/12) to the Parish's black population of 17.6%. App. 83a. The plan was drawn by William Cooper for the exclusive purpose of "creat[ing] two majority black districts," J.A. 260, wholly without regard to precinct boundaries. The NAACP plan subordinates traditional redistricting principles, such as compactness and respect for the political boundaries of towns, the Police Jury districts and precincts. A district court in a related case said of a modified, "improved" version of the NAACP plan, that it "most nearly resembles an octopus as it stretches out to the nooks and crannies of the parish in order to collect enough black voting age population to create not one, but two, majority-black districts in Bossier." J.A. 38.

In direct contravention of Louisiana law, the NAACP plan splits 46 precincts, 65 times. Plaintiff's Exh. 11, pp.

1-26; App. 29a. (Some of the precincts suffered more than a single split; thus requiring that they become three or more new precincts.) Of these, 17 precincts would have had less than 20 people in them. Plaintiff's Exh. 11, pp. 1-26.

On September 3, 1992, the School Board responded to NAACP concerns by granting its request that a black person be appointed to the vacant seat on the Board. Far from being a "meaningless palliative" as the government has previously contended, Brief for the Federal Appellant, *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471 (1997) (No. 95-1455) ("*Bossier I*") at 28, the appointment of Jerome Blunt is indicative of "the Board's demonstrable willingness to *ensure* black representation on the Board. . . . " App. 112a (emphasis in original).

At the same September 1992 meeting, the Board also passed a motion of intention to adopt the Police Jury's redistricting plan. The jury plan offered "the twin attractions of guaranteed preclearance and easy implementation (because no precinct lines would need [to be] redraw[n])". App. 106a. By maintaining the integrity of the Police Jury's precincts, the School Board not only complied with Louisiana law, but also avoided the costs and disruptions that would have accompanied the NAACP plan. Furthermore, the School Board understandably assumed that the Department of Justice would automatically preclear a plan that was *identical* to one the Department found to be entirely free of any discriminatory purpose or effect just one year before. The plan also offered the substantial promise that black voters would be able to elect a candidate of their choice as demonstrated by the fact that two districts were well over 40% black.

On January 4, 1993, the School Board submitted its plan to the Department of Justice for preclearance. Despite the identity between the Police Jury and School Board plans, the Department denied preclearance citing "new information, particularly the 1991 [P]olice [J]ury elections held under the 1991 redistricting plan and the 1992 redistricting process for the [S]chool [B]oard." App. 235a. Yet, the only noteworthy

event of the 1991 Police Jury elections was that Jerome Darby was once again re-elected, this time without opposition, to represent a majority-white district.

The clearest evidence of the opportunity of Bossier's black citizenry to participate meaningfully in the electoral process lies in the incontrovertible fact that *three* black candidates have now been elected to the School Board in 1998 under its plan.[4] The election of three black members to the School Board under the new plan completely refutes appellants' repeated claim that the "clearly foreseeable effect" of the plan was to prevent any black candidates from being elected. *See, e.g.*, Brief for the Federal Appellant, *Bossier I* at 22. It also conclusively refutes the wholly unsubstantiated speculation of the Justice Department's expert, Dr. Engstrom, that the white population will not vote for black candidates in Bossier Parish.[5]

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[4] It is well established that a court may take judicial notice of any fact that is not subject to reasonable dispute and is capable of accurate and ready determination. *See, e.g.*, Fed. R. Evid. 201. Accordingly, appellate courts have routinely taken judicial notice of post-trial elections in voting rights cases given their clear relevance to the proceedings. *See, e.g., Southern Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1288 n.13 (11th Cir. 1995), *cert. denied*, 516 U.S. 1045 (1996) ("To provide a current depiction of the composition of the [Alabama Supreme Court] we have taken judicial notice of information not available at the time the district court rendered its decision."); *Westwego Citizens for Better Gov't v. City of Westwego*, 906 F.2d 1042, 1045 (5th Cir. 1990) (noting that "given the long term nature and extreme costs necessarily associated with voting rights cases, it is appropriate to take into account elections occurring subsequent to trial.").

[5] *There is no competent evidence of racial bloc voting in any local Bossier Parish elections.* Specifically, Dr. Engstrom was concededly unable to find *any* racial bloc voting in *any* election for *any* Bossier Parish office, pursuant to either the "extreme case analysis [or] bivariate ecological regression analysis" endorsed by the *Gingles* plurality opinion. *Thornburg v. Gingles*, 478 U.S. 30, 52-53 (1986); J.A. at 115-21. The *only* election where racial bloc voting was found was one "exogenous" *state judicial* race (held not just in Bossier Parish), which obviously reflects

Two elections have been held under the redistricting plan adopted by the School Board. In 1994, two black candidates were elected to the School Board. Julian Darby was elected from district 10, which is only 26.7% black. J.A. 47. Vassie Richardson, who is also black, was elected from district 4, which is 45% black. In the interim period between elections, the School Board appointed Kenneth Wiggins, an African-American, to fill a vacancy in district 8 on the School Board. In the 1998 elections, Mr. Wiggins was challenged by a white Republican opponent. Even though Mr. Wiggins' district was only 21.1% black, he won re-election. *See* J.A. 47; Official Elections Results attached hereto at A4. Also, both Julian Darby and Vassie Richardson were again elected, this time without opposition. *Id.* at A8. As a result of these elections in which three black candidates have been elected to the School Board, it is now clear beyond a reasonable doubt that minorities have a meaningful opportunity to elect representatives of their choice in at least three districts under the School Board's plan. They also enjoy *25%* (3/12) of the representation on the School Board in a parish with only *20.1%* black population and *17.6%* black voting age population. App. 79a. Inexplicably, appellants seek to undo this remarkable success story of racially *nonpolarized* voting and *extra-proportional* representation of black School Board officials and replace it with a plan where black voters are packed into *two* majority districts. Since such black majority districts are plainly not needed to provide black voters a viable opportunity to elect their preferred candidates and three blacks have been elected in white-majority districts, there is absolutely no beneficial purpose

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different voting patterns than those for *local representative* office. J.A. 113-15. *See, e.g., Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143, 1149 (5th Cir.), *cert. denied*, 510 U.S. 994 (1993). Even in this single race, the "racial polarization" led to the black candidate receiving 35.7% of the vote in a parish with a 17.6% black voting age population, a positive difference of 18.1%. J.A. 57.

served by this racial gerrymander and its "clearly foreseeable effect" is to *dilute* black voting strength.

ARGUMENT

I. THIS APPEAL IS NONJUSTICIABLE UNDER ARTICLE III.

Appellants seek to have this Court opine on the legal validity of a six-year-old redistricting plan that will never again be used in any election. Article III prevents such an advisory opinion as appellants lack standing and the case is now moot. It has long been recognized that the "case-or-controversy requirement [of Article III] subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Accordingly, "the standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055, 1067 (1997) (citing *Diamond v. Charles*, 476 U.S. 54, 62 (1986)). Likewise, "Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing." *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (citing *Sosna v. Iowa*, 419 U.S. 393, 402 (1975)). Therefore, Article III requires a case to be dismissed as moot "if an event occurs [pending review] that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)).

This Court lacks jurisdiction over this appeal because, regardless of whether the Court affirms or remands the lower court's declaratory judgment preclearing the Board's 1992 redistricting plan, that plan will never again be used for any purpose. One month after appellants filed their jurisdictional statements in this Court, the last election ever to be held

under the School Board's plan was conducted, and three black candidates were elected. The School Board's plan will never again be utilized because under Louisiana law, the next School Board election will not take place until 2002. LA R.S. 17:52. By that time, new federal decennial census data will be available, and thus the School Board will be required under this Court's one-person one-vote precedents to adopt a new apportionment plan. Accordingly, the current plan is already a dead letter. In the terms of Section 5, the voting "practice" at issue here will never again be "enforce[d]" by any official in Bossier Parish. 42 U.S.C. § 1973c.

The Court has held that Section 5 challenges to election procedures that have already been implemented and that will not be enforced in the future are moot. In *Watkins v. Mabus*, 502 U.S. 954 (1991), the Court considered whether "the preclearance requirements of Section 5 of the Voting Rights Act apply to the changes in the absentee ballot procedures adopted for the September 17 election. . . ." As the election had already occurred and the challenged procedure would not be utilized in the future, the Court held that "[t]he completion of the September 17 election has rendered this claim moot with regard to the relief sought, *i.e.*, an order enjoining the September 17 election for failure to comply with preclearance requirements." 502 U.S. at 954-55. Likewise, in *Hall v. Beals*, 396 U.S. 45 (1969), the Court held that a suit for injunctive relief against a voter residency requirement was moot because the election had already taken place and the statute was no longer in effect.

As these cases reflect, there are two related jurisdictional bars to this Court's jurisdiction to entertain this appeal. First, neither party has any legally cognizable interest in these proceedings. As the parties "invoking federal jurisdiction," appellants "bear[ ] the burden" of establishing that they have a "legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). *See Arizonans*, 117 S. Ct. at 1067; *Diamond v. Charles*, 476 U.S. 54, 62 (1986). It is clear that appellants, who seek only prospective relief, will not suffer

any injury in fact, let alone "actual or imminent" injury, under a plan that will never again be utilized and thus they have no standing to invoke this Court's jurisdiction. *Lujan*, 504 U.S. at 560 (internal quotations omitted). Moreover, this Court has made clear that " '[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' " *Lujan*, 504 U.S. at 564 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (internal quotations omitted)).

Indeed, if the case is remanded, the School Board, as plaintiff, will voluntarily dismiss its suit because the Board obviously has no interest in obtaining a ruling on the validity of a law that no longer has force or effect. This is a classic case where resolution of the legal issues presented will have no concrete effect on the parties. By contrast, in a typical Section 5 case, the requisite "controversy" exists because a covered jurisdiction has an interest in eradicating the presumptive injunction Section 5 imposes on all voting changes. No such interest obtains, however, where the voting practice in question will not be used even absent the presumptive injunction imposed by Section 5.

For essentially the same reason, the case is now moot. This Court has repeatedly held that Article III precludes review of laws that have expired and thus have no further force or effect. *See, e.g., Burke*, 479 U.S. at 363. Such cases are moot because where a party seeks injunctive relief and the law is no longer in effect, there is quite plainly no live case or controversy. Just so here, appellants' attempt to "prevent" the Board's redistricting plan from being used in any future election is of purely academic interest because the Board will not and cannot use the plan for voting purposes regardless of how the Court rules. *See Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194 (1997) (" 'The real value of the judicial pronouncement – what makes it a proper judicial resolution of a "case or controversy" rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the*

defendant towards the plaintiff.' ") (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)) (emphasis in original).

Stated somewhat differently, there is no relief that the Court can grant which will redress appellants' purported injuries. *See, e.g., Oil, Chemical and Atomic Workers Int'l Union v. Missouri*, 361 U.S. 363, 371 (1960); *Northeastern Fla. Chapter of Associated Gen. Contractors v. Jacksonville*, 508 U.S. 656, 669-70 (1993) (O'Connor, J., dissenting).[6] Any relief entered in this action will have no effect: if a declaratory judgment issues, the School Board's plan will not be used for future elections; if a declaratory judgment does not issue, the School Board's plan will not be used in future elections. Preventing enforcement of a law that is already a nullity cannot redress any injury.

In this regard, it is important to recognize that this litigation cannot result in an order invalidating the 1998 elections and requiring that new elections be held. Rather, all that the district court could do on remand is withdraw its prior declaratory judgment, and therefore *prospectively* prohibit appellee from conducting *future* elections under this plan, a result that is already compelled. Such an order, however, would have no effect on the 1998 elections conducted pursuant to the preclearance order already issued, just as this Court's prior remand had no effect on the 1994 elections.

Moreover, although it is irrelevant to whether *this* case presents a live controversy, we further note that no other court could undo the 1998 elections for any alleged Section 5 violation. Rather, the local Section 5 district courts are sharply limited to addressing "[t]he only issue" over which they have jurisdiction, *i.e.*, "whether a particular state enactment is subject to the provisions of the Voting Rights Act, and

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[6] Needless to say, a redistricting plan with a life span of 8 to 10 years is not "capable of repetition, yet evading review." *Morse v. Republican Party*, 517 U.S. 186, 235 n.48 (1996) (Stevens, J.). Moreover, the Board has "disavowed" future use of the practice at issue here and no monetary payments have been made by appellants. *Id.*

therefore must be submitted for approval before enforcement." *Allen v. State Bd. of Elections*, 393 U.S. 544, 558-59 (1969). Thus, the local district courts may prospectively enjoin elections where the voting change has not been submitted and, as a corollary power in some circumstances, may order new elections where no such preclearance had been obtained prior to the election. *See, e.g., Berry v. Doles*, 438 U.S. 190 (1978). Here, however, the School Board elections in October of this year were held pursuant to a plan that had been submitted and precleared in conformance with Section 5.[7] In light of this preclearance, the local law adopting the Board's redistricting plan is entitled to the same presumption of validity as any law not subject to Section 5's constraints and appellants did not seek to stay the D.C. district court's order to prevent the October elections. Particularly since the local district court has no authority to second-guess the validity of the preclearance order of the court below, it cannot undo the elections authorized by that court.[8] Consequently, so far as we can discern, no Section 5 case has ever invalidated any election because it was based on a voting change that had been "erroneously" precleared by a court with jurisdiction prior to the election. As a practical matter, of course, no rational equity court would undo an election where *three* districts have just elected black candidates in order to substitute a plan providing black voters with an opportunity to elect *two* candidates of their choice.

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[7] Specifically, the district court's order in this case stated that "plaintiff Bossier Parish School Board is given pre-clearance for its election plan adopted on October 1, 1992, and [ ] it shall have a declaratory judgment to that effect." *Bossier Parish Sch. Bd. v. Reno*, No. 94-01495 (D.D.C. May 1, 1998).

[8] *Allen v. State Bd. of Elections*, 393 U.S. 544, 549-50 (1969) ("Once the State has successfully complied with § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5."); *Lopez v. Monterey County*, 117 S. Ct. 340, 349 (1997); *Berry*, 438 U.S. at 193 (Brennan, J., concurring).

In short, even if Article III permitted it, there is simply no practical reason to determine whether a six-year old redistricting plan that will never again be used and has resulted in the election of three black candidates was unlawful because it was allegedly "designed" to prevent the election of two black candidates. Given the dispositive nature of these threshold jurisdictional issues, this case does not warrant this Court's plenary review as no substantial federal questions are properly before the Court.

II. THE DISTRICT COURT DID NOT RULE THAT SECTION 5 REACHES ONLY RETROGRESSIVE INTENT.

As they did in the first appeal in this case, the United States and private appellants seek to create a legal issue where none exists by misinterpreting the actual rationale of the court below. App. 10a (Silberman, J., concurring) ("[T]he government filings in the Supreme Court were deceptive."). In its first *Bossier* opinion, this Court expressly left "open for another day the question whether the § 5 purpose inquiry ever extends beyond the search for retrogressive intent." App. 45a. Appellants maintain that the court below resolved this legal issue by holding that, as a matter of law, only retrogressive intent can violate Section 5 and, as a consequence, it did not address whether the Board possessed a discriminatory, albeit non-retrogressive, purpose. At the same time, however, appellants also contend that the court below expressly "*declined*" to resolve this legal issue that the Court had reserved. U.S. J.S. at 12; Appellant-Intervenors' Jurisdictional Statement ("Int. J.S.") at 14. Appellants have therefore simultaneously taken the inherently contradictory positions that the court below *resolved* the question of whether Section 5 reaches beyond retrogressive intent and that it *declined* to resolve the question of whether Section 5 reaches beyond retrogressive intent. The truth, however, is that the district court did decline to resolve this legal question. It did so because it was unnecessary to its decision since it had made the *factual* finding

that there was no evidence " 'that the Board enacted the [redistricting] plan with some non-retrogressive, but nevertheless discriminatory, "purpose." ' " App. 3a n.2 (quoting *Bossier I*, 117 S. Ct. at 1501).

First, the lower court established that it was fully aware that the Court had "left for another day the question" whether Section 5 prohibits actions taken with non-retrogressive discriminatory intent. App. 3a. It then "decline[d]" to "answer the question the Court left for another day" because "the *record will not support* a conclusion that extends beyond the presence or absence of retrogressive intent." *Id.* (emphasis added). While the court could "imagine a set of facts that would establish a 'non-retrogressive, but nevertheless discriminatory, purpose' " it found that "those imagined facts are *not present here.*" App. 3a-4a (emphasis added).

Thus, the district court plainly stated that resolution of the question whether Section 5 prohibits a discriminatory, but non-retrogressive, purpose was unnecessary to decide this case because the facts supporting any such discriminatory purpose were "not present here." It did not hold, as appellants maintain, that if such discriminatory purpose were "present here," the Board would nonetheless be entitled to preclearance under Section 5 because that statute proscribes only "retrogressive" intent.

The rest of the court's analysis further confirms that it was analyzing the question of "non-retrogressive, but nevertheless discriminatory, 'purpose.' " First, it plainly stated that, as it had already ruled in *Bossier I*, the School Board had the "difficult[ ]" "burden to prove the *absence* of *discriminatory* intent." App. 5a. (First emphasis in original, second emphasis added). Next, the court analyzed the Board's reasons for adopting the Police Jury plan *in preference to the NAACP* plan, not whether the Board had adopted the Police Jury plan for the purpose of putting minorities in a worse position than they enjoyed under the Board's 1980 redistricting plan. Thus, it squarely held that "the school board's resort

to the pre-cleared Jury plan (which it mistakenly thought would easily be pre-cleared) and its focus on the fact that the Jury plan would not require precinct-splitting, while the NAACP plan would, were 'legitimate, nondiscriminatory, motives.' " *Id.* Again, then, the court was holding that the Board's "motives" for adopting the Jury plan in preference to the NAACP plan were "legitimate [and] non-discriminatory" because the Police Jury plan better furthered the race-neutral policy of preserving precincts than the NAACP plan. Comparing the relative virtues of the Police Jury plan and the maximizing alternative proposed by the NAACP makes no sense if the court were analyzing only whether the Board's purpose was to cause retrogression. For "[r]etrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its *existing plan*." App. 35a (emphasis added). In contrast, the court below analyzed whether the Board adopted the Police Jury plan over the "alternative voting practice . . . benchmark" proposed by the NAACP for impermissible or "non-discriminatory" "motives." App. 4a, 5a. This is classic "discriminatory purpose" analysis used in all *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), and employment cases – *i.e.*, whether the minority applicant (or integrative alternative) was rejected for racial reasons or for "legitimate, nondiscriminatory reasons." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 n.8 (1978).

Similarly, when the court analyzed the impact of the proposed plan under *Arlington Heights* and this Court's remand, the district court did not look only at "whether the Jury plan bears more heavily on blacks than the pre-existing plan." App. 5a. Rather, after disposing of private appellants' argument that the Jury plan had such a retrogressive effect, the court analyzed the other "allegedly dilutive impacts of the Jury plan" that appellants had offered "in support of its *discriminatory* intent argument." App. 6a (emphasis added). Of course, as the district court was well aware, this Court in *Bossier I* had used the term "dilutive impact[ ]" to denote a

situation where a jurisdiction chooses a plan that "dilutes" black votes as compared to a "reasonable alternative voting . . . benchmark" and in contradistinction to a plan which had a "retrogressive effect" because it diluted black votes more than the "existing plan." App. 37a, 35a. *See* App. 46a-47a. *See also* App. 10a-11a (Silberman, J., concurring). Thus, as instructed by this Court on remand, the district court was analyzing whether the choice of the allegedly "dilutive" alternative reflected a "discriminatory intent."

In this regard, the court found that the Board's plan could have reflected an impermissible purpose if it had "deliberately attempted to break up voting blocks before they could be established or otherwise to divide and conquer the black vote" by, for example, "fail[ing] to respect communities of interest and cutting across attendance boundaries." App. 6a. In this case, however, it found "an absence of such evidence in this record" and thus the discriminatory purpose assertion to be "too theoretical, and too attenuated, to be probative." *Id.*[9] Thus, the court correctly considered and rejected appellants' assertion that the Board had "split . . . minority neighborhoods that would have been grouped into a single district . . . if the [Board] had employed the same line-drawing standards in minority neighborhoods as it used elsewhere in the jurisdiction." *Johnson v. DeGrandy*, 512 U.S. 997, 1015 (1994). Examining such evidence of "fragmentation" is standard analysis in determining whether a jurisdiction was acting

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[9] To the contrary, as is demonstrated by the fact that the Police Jury plan was precleared after careful scrutiny by the Justice Department, the Board's plan kept intact any reasonable concentration of minority voters that was feasible under neutral principles and state law. In a parish with a 20.1% black population, this resulted in the creation of two districts with 45% and 43.7% black populations, respectively, and four districts with black populations of between 21% and 29%. J.A. 47. It merely did not seek, as the NAACP plan concededly did, to unite through a race-conscious gerrymander widely dispersed black concentrations that never would have been united were their racial composition different.

with the discriminatory purpose of intentionally diluting minority voting strength.

Finally, the district court opinion clearly stated that it was adhering to the same "method of analysis" as its "earlier" decision. App. 5a. The earlier decision plainly focused exclusively on whether the NAACP plan was rejected for impermissible racial reasons, but did not focus on retrogressive intent. App. 105a. The concurring opinion emphasized in this regard that the court was *again* analyzing whether " 'the School Board has failed to provide an adequate reason explaining why it declined to act on a proposal featuring two majority-black districts.' " App. 9a (quoting App. 113a). It noted that it had both considered "dilutive impact" and applied the *Arlington Heights* framework in its first opinion – contrary to appellants' representation to this Court in the first *Bossier* appeal. App. 10a. The concurrence then affirmatively stated that it engaged in such analysis again, while adding only that it was "now" dealing expressly with the Board's compliance with the outstanding school desegregation decree. App. 11a. Thus, the concurrence further confirms that the district court opinion was simply fleshing out its first discriminatory purpose analysis, and was not substituting some new legal standard that focused exclusively on retrogressive intent.

To be sure, the majority opinion adverts on several occasions to the Board's "retrogressive intent." App. 6a-7a. In context, however, this should not be read as indicating that the district court somehow had *sub silentio* made the legal determination that *only* retrogressive intent violates the purpose prong of Section 5. Rather, these statements must be read in conjunction with the district court's threshold decision that there was no *evidence* of "non-retrogressive, but nonetheless discriminatory, 'purpose,' " and its incorporation of its prior findings that the Board's "change was undertaken without a discriminatory purpose." *See* App. 105a. Given the absence of such discriminatory purpose evidence, the court below quite naturally sometimes phrased its conclusions in

terms of retrogressive intent. Since, in this opinion, the court had already found that rejection of the NAACP plan was done pursuant to "legitimate, non-discriminatory motives," it did not need to reiterate that finding when it was dealing with each of the separate pieces of the *Arlington Heights* evidence. This is particularly true since, when considering each of the *Arlington Heights* factors, it incorporated by reference the court's earlier decision – in which it plainly did find that the plan was not motivated by discriminatory intent. *See* App. 6a-7a. Finally, as noted, the court often stated its conclusions in terms of "discriminatory" purpose, not "retrogressive" purpose. App. 5a, App. 6a (appellants had failed "to rebut the non-discriminatory reasons advanced by the school board" for adopting its plan).[10]

In short, it is quite implausible that the lower court would have resolved the legal question that this Court made clear was important and unsettled without discussing in any way the reasons for adopting this legal position. When coupled with the court's express refusal to resolve the legal question of Section 5's scope, the decision cannot reasonably be read as deciding that issue one way or another. At a minimum, this Court should not resolve that concededly unsettled legal issue in circumstances where it is, at best, ambiguously presented.

III. THE PURPOSE INQUIRY UNDER SECTION 5 OF THE VOTING RIGHTS ACT RELATES EXCLUSIVELY TO RETROGRESSIVE INTENT.

If the Court concludes it has jurisdiction over a live "case or controversy" and decides to resolve the issue raised by appellants, the Court should affirm on the ground that the purpose inquiry under Section 5 of the Voting Rights Act relates exclusively to retrogressive intent. This conclusion is

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[10] Similarly, while the court did say that the Board's action reflected a "determination to maintain the status quo," it is unclear whether the status quo referred to was the previously enacted Police Jury plan or the Board's own 1980s redistricting plan. App. 7a.

mandated by the plain language of the statute, its purpose, and its structure.

It is a bedrock principle of this Court's statutory construction jurisprudence that "[w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). *See also Robinson v. Shell Oil Co.*, 117 S. Ct. 843, 846 (1997) ("Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.' ") (quoting *United States v. Ron Pair Enterprises*, 489 U.S. 235, 240 (1989)); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("[W]hen a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished."). The interpretation of the term "purpose" under Section 5 presents just such a case where the text of the statute resolves its meaning. Section 5 provides in pertinent part that a covered jurisdiction is entitled to a declaratory judgment authorizing a proposed voting change where the practice at issue "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. . . . " 42 U.S.C. § 1973c. Under the statute then, preclearance will be denied if a proposed change has either (1) the "purpose . . . of denying or abridging the right to vote on account of race or color" or (2) "the effect of denying or abridging the right to vote on account of race or color." Significantly, it is agreed by all that a proposed change has the "effect of denying or abridging the right to vote" only if it has retrogressive effect on minority voters. *See, e.g.*, App. 46a ("we have adhered to the view that the only 'effect' that violates § 5 is a retrogressive one."); *City of Lockhart v. United States*, 460 U.S. 125, 134 (1983); *Beer v. United States*, 425 U.S. 130, 141 (1975). Thus, the "purpose . . . of denying or abridging the right to vote" must also be understood to relate exclusively to retrogression.

A contrary conclusion can only be reached if one assumes that the phrase "denying or abridging the right to vote on account of race or color" has a different meaning as it relates to purpose and effect. Such an interpretation would be absurd, as no principle of common usage, grammar, or logic would suggest a solitary phrase modifying two objects in the same sentence could have a different meaning as to each noun. Not surprisingly, appellants have not cited to a single case where this Court has endorsed such a counterintuitive and anomalous method of construing a statute. If the phrase "abridging or denying the right to vote" refers to retrogression as it relates to the term "effect," it inexorably follows that it must have the same meaning as it applies to the term "purpose." *See, e.g., BankAmerica Corp. v. United States*, 462 U.S. 122, 129 (1983) ("[W]e reject as unreasonable the contention that Congress intended the phrase 'other than' to mean one thing when applied to 'banks' and another thing as applied to 'common carriers,' where the phrase 'other than' modifies both words in the same clause."); *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

Although resort to additional sources is unnecessary in light of the unambiguous meaning of the statute's plain language, the purpose of Section 5 confirms the foregoing conclusion. The Court has repeatedly held that the purpose of Section 5 was "to halt actual retrogression in minority voting strength. . . . " *City of Lockhart*, 460 U.S. at 133. Thus, in *Lockhart*, " '[s]ince the new plan did not increase the degree of discrimination against [the City's Mexican-American population], it was *entitled* to § 5 preclearance [because it was not retrogressive].' " App. 36a (quoting *Lockhart*, 460 U.S. at 134) (emphasis added). Likewise, in *Beer*, the Court elaborated: "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective franchise of the electoral franchise." 425 U.S. at 141. *See also Lockhart*, 460 U.S. at 134 ("the aim of Section 5 was to prohibit *only* retrogressive changes")

(emphasis added); *City of Richmond v. United States*, 422 U.S. 358, 388 (1975) (Brennan, J., dissenting) ("the fundamental objective of § 5 [is] the protection of *present* levels of voting effectiveness for the black population.") (emphasis in original). As this Court explained in its prior opinion, Congress achieved this "limited purpose" by " 'freezing election procedures in the covered areas' " and thereby prevented further retrogression in the voting rights of minorities. App. 34a (quoting *Beer*, 425 U.S. at 140) (internal citations omitted).

This view of the "limited purpose" of Section 5 is entirely consistent with, and in fact necessitated by, the structure of the statutory scheme. Although the provisions of the Voting Rights Act taken together certainly intended to "rid the country of racial discrimination in voting," *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966), it was left to Section 2 of the statute to provide a remedy against existing forms of discrimination. By contrast, Section 5 was implicated only where a *change* in a voting practice or procedure was proposed by a covered jurisdiction. By specifically linking application of Section 5 to a change in a procedure, the statute necessarily assumes that Section 5 has no bearing on the perpetuation of existing practices, even if such practices are maintained for discriminatory purposes. Rather, Section 2 of the Voting Rights Act and the Constitution are the devices for stopping continued use of practices that were adopted for a discriminatory purpose. In short, the structure of the statute confirms what the text and purpose of Section 5 make clear: both the purpose and effect tests of this provision relate exclusively to retrogression.

The limited availability of Section 5 relief is dictated by the "severe" burdens that this provision places upon the states. *Allen*, 393 U.S. at 556. *See also Katzenbach*, 383 U.S. at 334 (noting the "exceptional conditions" that justified the utilization of such an "uncommon exercise of congressional power"); *id.* at 360 (Black, J., concurring and dissenting) (Section 5 represents "a radical degradation of state

power. . . . "). Under Section 5, the normal heavy presumption of validity for state laws is reversed, and the state law is deemed presumptively *unlawful* until the state has demonstrated an absence of retrogressive purpose and effect. *Cf. Parham v. Hughes*, 441 U.S. 347, 351 (1979). Consequently, it has long been recognized that significant "federalism costs [are] already implicated by § 5 preclearance." App. 38a (citing *Miller v. Johnson*, 515 U.S. 900, 926 (1995)). Accordingly, it was entirely appropriate for Congress to have limited the reach of Section 5's presumptive injunctive effect to voting procedures that were motivated by a retrogressive intent or that had a retrogressive effect. This creates no risk that minorities will be subjected to plainly purposeful discrimination since such action will easily be prevented through Section 2 or constitutional challenges.

At bottom, appellants' attempt to refute the compelling evidence of the "limited purpose" of Section 5 stems from their belief that the Department of Justice should not preclear a plan that perpetuates "long-entrenched racial discrimination." U.S. J.S. at 20. But it is clear that *Section 5 does* plainly tolerate "continu[ing] in place a discriminatory status quo" since it reaches only *alterations* of that status quo. *Id.* at 25-26. Again, Section 2 and the Constitution deal with efforts to *maintain* discriminatory practices. Indeed, this Court in *Bossier I* rejected an almost identical argument, *i.e.*, Section 5 simply must be interpreted to prohibit clear Section 2 violations because otherwise the Attorney General would be forced to preclear a change she believes is unlawfully discriminatory. App. 37a, 62a. Since it is fully consistent with Section 5's purpose and structure to conclude that the Attorney General has no authority to withhold preclearance for "clear violations" of Section 2, it is equally legitimate to conclude that she is without authority to deny preclearance for constitutional violations. So recognizing the "limited substantive goal" of Section 5 in no way "tolerates" unlawfully discriminatory practices, it simply recognizes that such practices

should be challenged under the laws which render them illegal.

In the face of the unambiguous text and plain purpose of the statute, appellants improperly seek to invoke the legislative history of the 1982 reenactment of Section 5 as support for the proposition that the statute extends well beyond the search for retrogressive intent. Specifically, appellants invoke a footnote in the 1982 Senate Report which, they claim, demonstrates that Congress understood that Section 5, as interpreted in *Beer*, prohibited changes with a discriminatory purpose. U.S. J.S. at 19 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 12 n.31 (1982)). But this Court has already twice ruled that the Senate Report's understanding of *Beer* in no way controls the interpretation of Section 5 if, as here, that legislative history is in any way inconsistent with the statute's language and structure. First, relying on the very same Senate Report footnote offered by appellants, Justice Marshall argued in his *Lockhart* dissent that the 1982 Congress believed "that the rule laid down in *Beer* governed *ameliorative* changes," but did "not allow covered jurisdictions to adopt voting procedures which maintain existing discrimination." 460 U.S. at 145 (Marshall, J., dissenting) (emphasis in original). The *Lockhart* court nonetheless ruled that Section 5 permitted changes which either ameliorated *or* maintained the prior system because that result was required by the statute's language and structure. 460 U.S. at 134; App. 42a (describing *Lockhart* as "reaching its holding over Justice Marshall's dissent, which raised the argument now advanced by appellants regarding this passage in the Senate Report"). Similarly, in *Bossier I*, this Court ruled that the Senate Report's plain statement that Congress understood *Beer* to reach discriminatory "results" did not authorize a Section 5 objection to challenge such results. App. 42a. Thus, appellants' invocation of this very same footnote for the third time does not support their extra-textual interpretation of Section 5.

To be sure, "*Beer's* dictum suggests that any changes that violate" the Constitution also violate Section 5. App. 71a

(Stevens, J., dissenting in part and concurring in part). *See also* App. 39a (*Beer* "cited in *dicta* a few cases to illustrate when a redistricting plan might be found to be constitutionally offensive."). As an initial matter, of course, this dictum cannot alter the inexorable effect of the Section 5 statutory language. In any event, it is not at all clear that the *Beer* court believed that rejection of a proposed black-majority district(s) in a single-member redistricting scheme would constitute a constitutional violation, even if the rejection was motivated in part by racial concerns. Rather, although the law was unsettled because this Court had never struck down a single-member redistricting plan on constitutional grounds, the standard seemed to be that single-member redistricting schemes, as opposed to plans with multi-member districts, violated the Constitution only if they caused retrogression. Thus, in *City of Mobile v. Bolden*, 446 U.S. 55 (1980) – the case establishing the constitutional standard for vote dilution cases – the plurality noted that, under prior cases, a "districting statute otherwise acceptable, may be invalid because it fences out a racial group so as to deprive them of their *pre-existing municipal vote*. *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)." *City of Mobile*, 446 U.S. at 69 n.14 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973) (emphasis added)). In contrast, it noted that "multi-member districts" could be unconstitutional without such retrogression in minorities' "pre-existing . . . vote," if it were shown that at-large districts had been deliberately "*employed* to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* (emphasis in original) (internal quotations and citations omitted). Thus, the *Mobile* plurality, and pre-*Beer* cases, seemed to strongly indicate that a single-member districting plan could violate the Constitution only if it caused retrogression by taking away minorities' "*theretofore enjoyed* voting rights," but not by engaging in even a race-conscious failure to create a black majority district. *City of Richmond v. United States*, 422 U.S. 358, 378-79 (1975) (quoting *Gomillion*, 364 U.S. at 347) (emphasis added). *See*

also City of Mobile, 446 U.S. at 85 n.4 (Stevens, J., concurring) (same); *id.* at 94 ("[W]e must accept the choice to retain Mobile's commission form of government as constitutionally permissible even though that choice may well be the product of mixed motivation, some of which is invidious.").

This reading of *Beer* is buttressed by the fact that the opinion, in explaining the constitutional standard to which it referred, stated that it could not "rationally" be argued that the Constitution was violated because a Louisiana jurisdiction (with a long history of discrimination) maintained a redistricting scheme that "almost inevitably would have the effect of diluting the maximum potential impact of the Negro vote." *Beer*, 425 U.S. at 142 n.14, 136. *See also id.* at 142 n.14 (the challenged redistricting plan "does not remotely approach a violation of the constitutional standards enunciated in those cases"). Obviously, if intentionally perpetuating a discriminatory redistricting system did constitute a constitutional violation, it certainly could be reasonably asserted that the New Orleans redistricting plan violated that standard. Moreover, in 1976 it was not at all clear that the rejection of a *black majority* district constituted vote dilution since creating such a district "*necessarily decreases* the level of minority influence in surrounding districts, and to that extent 'dilutes' the vote of minority voters in those other districts, and perhaps dilutes the influence of the minority group as a whole." App. 52a (Thomas, J., concurring). The Court had explicitly noted that it was not possible to determine whether the absence or presence of *minority-majority* districts diluted minority votes in *Wright v. Rockefeller*, 376 U.S. 52 (1964), the only case prior to *Beer* involving a single-member redistricting scheme: "Undoubtedly some of these voters . . . would prefer a more even distribution of minority groups among the four congressional districts, but others . . . would argue strenuously that the kind of districts for which appellants contended would be undesirable and, because based on race or place of origin, would themselves be unconstitutional." *Id.* at 57-58.

More generally, of course, it was not at all settled when *Beer* was decided in 1976 that the Constitution embodied a "discriminatory purpose" standard, particularly in the vote dilution area. *See* App. 39a; *City of Mobile*, 446 U.S. at 62, 66 (plurality opinion); *id.* at 85-86, 88-90 (Stevens, J., concurring); *id.* at 120 (Brennan, J., dissenting) ("Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the anti-discrimination branch, of our jurisprudence under the Equal Protection Clause."). Moreover, it remains unclear to this day whether the Fifteenth Amendment – the constitutional provision most closely mirroring the language of Section 5 – even reaches an intentionally discriminatory vote dilution claim. *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) ("This Court has not decided whether the Fifteenth Amendment applies to vote-dilution claims. . . . "); App. 58a and cases cited therein.

In light of all this, it simply cannot be reliably inferred that the *Beer* Court's reference in *dicta* to the constitutional standard denoted a discriminatory, albeit non-retrogressive, purpose – even assuming that the Court's *dicta* could expand the scope of Section 5 to invalidate changes not violated by Section 5 *itself*. In addition, *Beer* dealt with a situation where the jurisdiction was seeking preclearance of the redistricting plan for the *first time* after Section 5 was enacted in 1965. In the early 1970s, a conscious effort to maintain the status quo would very often perpetuate a racially discriminatory system of the sort that the Voting Rights Act was designed to eradicate. Here, in contrast, the Board's pre-existing 1980 redistricting plan was affirmatively found by the Attorney General to be free of any discriminatory purpose or effect. (Moreover, of course, the Board's plan mirrored precisely a plan the Attorney General had found free of discriminatory purpose and effect just one year before, when the Police Jury plan had been precleared.) Since maintenance of a non-discriminatory system cannot, under ordinary English usage, perpetuate a discriminatory system, a non-retrogressive plan will almost

never be "discriminatory" absent a retreat from the previously precleared system.

The rest of the cases cited by appellants can be disposed of summarily. Appellees' assertion that the Court has previously resolved the question of whether Section 5 reaches beyond retrogressive intent is obviously belied by the fact that the *Bossier I* court reserved this unsettled question. App. 45a-46a. Nor did either of the concurring opinions maintain that the Court's precedent required such a rule. App. 61a, 70a, 76a.[11]

The case upon which appellants primarily rely, *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), drew no distinction between retrogressive and discriminatory purpose and the result in that case had nothing to do with this distinction. In *Pleasant Grove*, the Court considered a covered jurisdiction's annexation of a parcel of land inhabited only by whites and an uninhabited parcel that was "intended for white developments." *Id.* at 468. Although the present retrogressive effect of these annexations was *de minimis*, the Court stated that Section 5 reached "future effects" and that "an impermissible purpose under § 5 may relate to anticipated as well as present circumstances." *Id.* at 471-72. The issue in

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[11] The court's summary affirmance in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983), is of little moment since summary affirmances are of slight precedential value. *See, e.g., Ashland Oil, Inc. v. Caryl*, 497 U.S. 916, 920 n.* (1990). In any event, that decision is entirely consistent with the opinion below since the primary flaw in *Busbee* was that the submitting jurisdiction had "split a cohesive black community in Districts 4 and 5" thus causing minor retrogression in District 4, albeit not in District 5. *Busbee*, 549 F. Supp. at 499. *See id.* at 498. As noted, the court below considered and rejected the notion that the Board had split or "fragmented" any cohesive black community. In *Miller v. Johnson*, 515 U.S. 900 (1995), the Court *overturned* the Justice Department's finding of discriminatory purpose as inconsistent with *any* understanding of that term and thus, as in *Bossier I*, resolution of the sort of purpose proscribed by Section 5 was "not necessary to [the court's] decision." App. 45a.

Pleasant Grove, therefore, was simply whether Section 5 reached anticipated circumstances, as well as present circumstances, but it drew no distinction between "discriminatory purpose" and "retrogressive purpose." Just as an annexation of land *currently* populated by whites alone could make minority voters worse off than they were prior to the annexation (*i.e.* retrogression), so too could annexing land that it was anticipated would be populated by whites. Indeed, the district court opinion faithfully tracked *Pleasant Grove's* distinction between future and present harm. Thus, the court found that Section 5's purpose prong would have been violated if there had been "any corroborating evidence that the School Board had deliberately attempted to break up voting blocks *before they could be established* or otherwise to divide and conquer the black vote." App. 6a (emphasis added). Thus, whatever the rationale of *Pleasant Grove*, it is in no way inconsistent with the court below's reasoning or result.[12]

Finally, although appellants insinuate that the district court's factual findings are "unsupported," U.S. J.S. at 24, this issue is not present here because, unlike their first appeal,

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[12] Likewise, the Court's decision in *City of Richmond* lends no support to appellants' interpretation of Section 5. There, the Court *upheld* an annexation that severely reduced the black population's pre-existing voting strength *notwithstanding* this undisputed *retrogressive* effect. 422 U.S. at 378. The Court then remanded the case to ensure that the motivation behind the annexation was not to cause such obvious *retrogression* in black voting strength, but was done for "verifiable, legitimate reasons." *City of Richmond*, 422 U.S. at 375. In doing so, the Court again equated "changes taken with the purpose of denying the vote on the grounds of race or color" with " 'despoil[ing] colored citizens, and only colored citizens, of their *theretofore enjoyed voting rights*.' " *Id.* at 378-79 (quoting *Gomillion*, 364 U.S. at 347) (emphasis added). Thus, *Richmond* merely holds that an indisputably retrogressive change, which might otherwise survive Section 5 review, will be struck down if the motive in undertaking the annexation was to cause such retrogression, rather than to accomplish some "legitimate" goal. It in no way suggests that a non-retrogressive change may be invalidated if motivated by a non-retrogressive purpose.

appellants have not contended that the district court's factual findings are "clearly erroneous." In any event, the district court's factual finding as to a lack of discriminatory intent is, at the very least, "plausible" and thus must be upheld under Fed. R. Civ. P. 52(a). *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

CONCLUSION

For the foregoing reasons, the Court should dismiss the appeal or summarily affirm the judgment of the court below.

Respectfully submitted,

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UNITED STATES OF AMERICA

State of Louisiana

Fox McKeithen

SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that the attached five (5) pages are true and correct copies of the Precinct by Precinct Returns for the following listed offices for the primary election scheduled and held on October 3, 1998, as per the originals on file in the archives of this office.

Member of School Board, District 2, Parish of Bossier
Member of School Board, District 3, Parish of Bossier
Member of School Board, District 8, Parish of Bossier
Member of School Board, District 9, Parish of Bossier
Member of School Board, District 12, Parish of Bossier

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, this the 3rd day of December, A.D., 1998.

Fox McKeithen

Secretary of State

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ELCRPT6 LA SECRETARY OF STATE 12/03/98
ELECTION RETURNS FOR ELECTION DATE 10/03/98 PAGE: 1

OFFICE: Member of School Board District 2
PARISH: Bossier (One to be Elected)

CANDIDATE	1 Knotts	2 Sterlin	3	4	5	6	7
Precinct Number							
4- 3B	174	121	0	0	0	0	0
4- 4A	209	208	0	0	0	0	0
4- 4B	154	136	0	0	0	0	0
4- 11B	106	85	0	0	0	0	0
Group Subtotal	643	550	0	0	0	0	0
*ABS	24	15	0	0	0	0	0
Parish Total	667	565	0	0	0	0	0
	54.14%	45.86%	.00%	.00%	.00%	.00%	.00%
Grand Total	667	565	0	0	0	0	0
	54.14%	45.86%	.00%	.00%	.00%	.00%	.00%

CANDIDATE LEGEND
1 Knotts "Mike" 32
2 Sterling Floyd B. 33

A2

ELCRPT6

LA SECRETARY OF STATE
ELECTION RETURNS FOR ELECTION DATE 10/03/98

12/03/98
PAGE: 1

OFFICE: Member of School Board District 3
PARISH: Bossier
(One to be Elected)

CANDIDATE Precinct Number	1 Finck	2 Mitchel	3	4	5	6	7
2- 1	112	235	0	0	0	0	0
2- 18B	122	30	0	0	0	0	0
2- 22	393	99	0	0	0	0	0
Group Subtotal	627	364	0	0	0	0	0
4- 2	158	81	0	0	0	0	0
4- 3A	51	80	0	0	0	0	0
Group Subtotal	209	161	0	0	0	0	0
*ABS	86	36	0	0	0	0	0
Parish Total	922	561	0	0	0	0	0
	62.17%	37.83%	.00%	.00%	.00%	.00%	.00%
Grand Total	922	561	0	0	0	0	0
	62.17%	37.83%	.00%	.00%	.00%	.00%	.00%

CANDIDATE LEGEND
1 Finck
2 Mitchell

George C.
James A.

34
35

A3

ELCRPT6

LA SECRETARY OF STATE
ELECTION RETURNS FOR ELECTION DATE 10/03/98

12/03/98
PAGE: 1

OFFICE: Member of School Board District 8
PARISH: Bossier
(One to be Elected)

CANDIDATE / Precinct Number	1 Engi	2 Wiggins	3	4	5	6	7
2- 11	85	65	0	0	0	0	0
2- 12A	16	19	0	0	0	0	0
2- 17B	26	59	0	0	0	0	0
2- 19	35	59	0	0	0	0	0
Group Subtotal	162	202	0	0	0	0	0
*ABS	6	4	0	0	0	0	0
Parish Total	168	206	0	0	0	0	0
	44.92%	55.08%	.00%	.00%	.00%	.00%	.00%
Grand Total	168	206	0	0	0	0	0
	44.92%	55.08%	.00%	.00%	.00%	.00%	.00%

CANDIDATE LEGEND
1 Engi
2 Wiggins

Jolene 36
Kenneth M. 37

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ELCRPT6 LA SECRETARY OF STATE 12/03/98
ELECTION RETURNS FOR ELECTION DATE 10/03/98 PAGE: 1

OFFICE: Member of School Board District 9
PARISH: Bossier (One to be Elected)

CANDIDATE	1 Barnett	2 Simison	3	4	5	6	7
Precinct Number							
2- 12C	25	55	0	0	0	0	0
2- 13	35	67	0	0	0	0	0
2- 14	51	61	0	0	0	0	0
2- 20	56	100	0	0	0	0	0
2- 23	24	31	0	0	0	0	0
Group Subtotal	191	314	0	0	0	0	0
*ABS	7	7	0	0	0	0	0
Parish Total	198	321	0	0	0	0	0
	38.15%	61.85%	.00%	.00%	.00%	.00%	.00%
Grand Total	198	321	0	0	0	0	0
	38.15%	61.85%	.00%	.00%	.00%	.00%	.00%

CANDIDATE LEGEND
1 Barnett "Brad" 38
2 Simison Gloria 39

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ELCRPT6 LA SECRETARY OF STATE 12/03/98
ELECTION RETURNS FOR ELECTION DATE 10/03/98 PAGE: 1

OFFICE: Member of School Board District 12
PARISH: Bossier (One to be Elected)

CANDIDATE / Precinct Number	1 Jackson	2 Knotts	3	4	5	6	7
1- 1	153	117	0	0	0	0	0
Group Subtotal	153	117	0	0	0	0	0
4- 8A	30	59	0	0	0	0	0
4- 8C	6	4	0	0	0	0	0
4- 10A	194	271	0	0	0	0	0
4- 10B	136	218	0	0	0	0	0
Group Subtotal	366	552	0	0	0	0	0
*ABS	5	19	0	0	0	0	0
Parish Total	524	688	0	0	0	0	0
	43.23%	56.77%	.00%	.00%	.00%	.00%	.00%
Grand Total	524	688	0	0	0	0	0
	43.23%	56.77%	.00%	.00%	.00%	.00%	.00%

CANDIDATE LEGEND
1 Jackson Juanita S. 40
2 Knotts Mack D. 41

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UNITED STATES OF AMERICA

State of Louisiana

Fox McKeithen

SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that the attached one (1) page is a true and correct copy of a list of unopposed candidates for the following listed offices for the primary election scheduled and held on October 3, 1998, as per the originals on file in the archives of this office.

Member of School Board, District 1, Parish of Bossier
Member of School Board, District 4, Parish of Bossier
Member of School Board, District 5, Parish of Bossier
Member of School Board, District 6, Parish of Bossier
Member of School Board, District 7, Parish of Bossier
Member of School Board, District 10, Parish of Bossier
Member of School Board, District 11, Parish of Bossier

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on,

this the 7th day of December, A.D., 1998.

Fox McKeithen

Secretary of State

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Office Title / Last Name	Office Description / First Name	Parish / Total Votes	Vote %	Result
Member of School Board Graham	District 1 Michael M.	BOSSIER 0	.00	U
Member of School Board Richardson	District 4 Vassie McCauley	BOSSIER 0	.00	U
Member of School Board Caseibry	District 5 Elizabeth S. "Libby"	BOSSIER 0	.00	U
Member of School Board Ray	District 6 Mary M. "Mary Margaret"	BOSSIER 0	.00	U
Member of School Board Slack	District 7 "J. W."	BOSSIER 0	.00	U
Member of School Board Darby	District 10 Julian L. "Julius"	BOSSIER 0	.00	U
Member of School Board Dowden	District 11 Gary K.	BOSSIER 0	.00	U

* * * E N D O F R E P O R T * * *